No. 14,324

United States Court of Appeals

For the Ninth Circuit

DeAngelis Coal Company, a Co-Partnership; American Lignite Products Co., a Co-Partnership; Nazzareno DeAngelis, Vincenzo DeAngelis, Mary DeAngelis, Joseph DeAngelis, Frank DeAngelis, Individually and as Co-Partners, doing business under the name of American Lignite Products Co.,

Appellants,

vs.

The Sharples Corporation,

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

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APPELLEE'S PETITION FOR A REHEARING.

To the Honorable Albert Lee Stephens, Walter L. Pope and James Alger Fee, Circuit Judges of the United States Court of Appeals for the Ninth Circuit:

Appellee in the above entitled cause, presents this, its petition for a rehearing of the above-entitled cause, and in support thereof, respectfully shows:

I.

APPELLANTS, BY THEIR UNQUALIFIED ACT OF SHIPPING THE PY-14 SUPER-D-CANTER BACK TO APPELLEE ON MARCH 20, 1952, ACCEPTED APPELLEE'S OFFER OF MARCH 5, 1952, AND NOTHING SAID OR DONE BY APPELLANTS SUBSEQUENT THERETO CAN ALTER THEIR CONTRACTUAL OBLIGATION TO THE APPELLEE.

In this matter the appellants purchased two machines known as Sharples PY-14 Super-D-Canters from appellee. Becoming dissatisfied they wrote appellee on February 22, 1952, requesting permission to return the second machine. (T.R. 36.) On March 5, 1952, appellee replied that it would accept the return of this machine at a cancellation charge of twenty-five per cent, which represented appellee's costs of manufacture. (T.R. 38.) Appellants then wrote, on March 14, 1952, that they would hold an answer in abeyance pending an exchange of correspondence. (T.R. 40.) On March 20, 1952, appellants shipped the machine from their plant at Ione, California, to appellee's factory in Philadelphia. (T.R. 10.) No communication of any sort accompanied the machine or the bill of lading, nor did appellants seek to qualify or explain their action until April 14, 1952, when, in response to a letter of appellee, dated nine days before receipt of the machine in Philadelphia, demanding payment of the purchase price, appellant, *for the first time,* indicated that it would not pay the service charge. (T.R. 42.)

The trial Court gave judgment for the service charge. This Honorable Court reversed on the grounds that no contract existed for the payment of the service

charge. The record before this Court consisted solely of the pleadings and the correspondence, the reporter's transcript not having been requested.

It is respectfully submitted that the decision of the trial Court, Hon. Dal M. Lemmon, was correct, and that a binding contract for the payment of the cancellation charge came into force upon the shipment of the machine, *unqualified in any manner,* the only error in the findings being the minor one of finding the date of the contract as of February 22, 1952 rather than March 20, 1952, the correct date upon which the machine was shipped. (Finding III, T.R. 13.)

The sole question here involved is whether Sharples' offer to take back the machine for a twenty-five per cent cancellation charge was accepted by DeAngelis. That acceptance did not have to be by words or correspondence; it could, on elementary principles, be by the acts or conduct of the acceptor. *Zurich, etc., Assurance Co. v. Industrial Accident Commission,* 132 Cal. App. 101; *Wood v. Gunther,* 89 Cal. App. 2d 718; 17 Corpus Juris Secundum 374; 135 A.L.R. 826; 12 Cal. Jur. 2d 212.

This case illustrates and is governed by those principles. The machine in question, as admitted by DeAngelis (Defendant's Answer, T.R. 7), had been sold to and was the property of DeAngelis. DeAngelis had made certain complaints, which the trial Court found baseless. (Findings VI, VII and VIII, T.R. 15-16.) Since the opinion of the Court refers in several places to DeAngelis' dissatisfaction with the ma-

chines, it should not be out of order to note that the employee of DeAngelis charged with the operation of the machines in his testimony completely negated any failure of performance by the machines.

At this stage, and in response to DeAngelis' request to return the machine, Sharples made its offer. DeAngelis replied, neither accepting nor rejecting. Then, six days after this letter, DeAngelis shipped its machine to Sharples without explanation.

If DeAngelis wished to preserve any claimed rights against Sharples it was a simple matter for them to qualify their act of shipment. A letter could have been sent contemporaneously, or with the Bill of Lading, or enclosed with or attached to the packing case. None of these steps did they take. In the face of their failure so to qualify their act of shipment, it is clearly and unequivocally referable to Sharples' offer of March 5, 1952, and respondent was fully justified in relying upon it as an acceptance.

Cate v. Good Bros., (Cir. 3), 181 Fed. 2d 146, is a case squarely in point. That case arose out of the sale of cheese. The sale was completed and there was apparently a dispute over the merchantable quality of the cheese. The seller wrote the buyer that it would accept the return of the cheese, give him credit for the net proceeds of any resale and require payment of the balance forthwith. The trial Court found, as did Judge Lemmon in the instant case, that the shipment of the merchandise by the buyer back to the seller was an acceptance of the terms of the seller's

offer, and gave judgment on the resulting contract. The Court of Appeals, in affirming this judgment stated:

> "The record establishes no tender by the seller to take back the cheese except upon the terms of this letter. *Thus the buyer's conduct appears to be an unambiguous response to the seller's letter.* The finding that the letter of January 11, was an offer and the return of the cheese an acceptance of that offer is a reasonable construction of this language and behavior. We find no basis for disturbing it." 181 Fed. 2d at 148. (Emphasis supplied).

The majority opinion in the present case seems to hold that Sharples' letter of April 7, 1952 (T.R. 41), demanding the full purchase price, was a withdrawal of the Sharples offer of March 5. The machine, however, had been shipped on March 20, and, unknown to Sharples, was en route to Philadelphia on April 7. Not only was this not inconsistent with the preceding offer, as pointed out by the concurring opinion, but at that stage the offer was beyond revocation —it had been accepted by the shipment on March 20. If, thereafter, DeAngelis had tendered the cancellation charge, Sharples would have been bound and would have had no right to demand the original purchase price.

> "Where the offer is to do something if the offeree will not merely promise to do, but do, something, compliance with the conditions of the offer by doing the act in the way prescribed is ordinarily sufficient evidence of the acceptor's assent, and

> it is not necessary to show that he notified the offerer that he accepted the offer and would perform the condition." 17 Corp. Jur. Sec. 386. See also 12 Cal. Jur. 2d 215; *Davis v. Jacoby,* 1 Cal. 2d 370; *Los Angeles Traction Co. v. Wilshire,* 135 Cal. 654.

The opinion of the majority, it is respectfully submitted, seems to confuse the outward manifestation of assent, *which is all that is necessary for an acceptance,* with the actual or inward intentions of DeAngelis. The governing rule was most aptly stated by Justice Holmes in *Hobbs v. Massasoit Whip Co.,* 158 Mass. 194, 33 N.E. 495 (cited with approval in *Wood v.* Gunther, 89 C.A. 2d 718) in the following words:

> "The proposition that an offer may be accepted by the conduct of the offeree stands on the general principle that conduct which imports acceptance or assent *is* acceptance or assent, in the view of the law, whatever may have been the actual state of mind of the party—a principle sometimes lost sight of in the cases."

See also, *Brant v. California Dairies, Inc.,* 4 Cal. 2d 128.

It therefore follows that the absence of any language by DeAngelis to the effect that they would pay the purchase price can have no effect upon the formation of the contract, for their assent is founded on their actions, not their words. While they had complained of the results of their process, as to which this machine was but one part, prior to March 20, DeAngelis gave no indication that they would not pay

the cancellation charge until April 14, some three and one-half weeks after their act of shipping the machine back. It is respectfully submitted that this subsequent attempt to repudiate and negate the effect of the act of shipment is wholly without force to cancel out their previous manifestation of assent, whatever light it might cast on the inward or secret intentions of DeAngelis. To hold otherwise is to reject the objective standards by which the law judges the formation of contracts. *Williston on Contracts,* Section 66.

Nor is the case of *Wright v. Sonoma County,* 156 Cal. 475, relied on by the concurring opinion controlling. The *Wright* case simply holds that one cannot by a demand for payment convert a continuous tort into a contractual obligation so as to avoid the necessity of proving damages for the tort.

It is respectfully submitted that this case is governed by the principles applied in *Cate v. Good Bros.,* above cited and discussed, and on those principles the judgment should be affirmed.

II.

THE QUESTION OF WARRANTY OR GUARANTEE WAS DECIDED AGAINST APPELLANTS BY THE DISTRICT COURT ON THE OVERWHELMING WEIGHT OF THE EVIDENCE, IS NOT AN ISSUE BEFORE THIS COURT, AND CANNOT ALTER THE FIXED CONTRACTUAL OBLIGATIONS OF THE PARTIES.

The opinion of the Court refers throughout to a claim of guaranty by DeAngelis. The statement is made:

> "If it [DeAngelis] was right about that, it had a right to return the machine. The mere offer to let it be returned upon payment of a service charge would not cancel that right."

It might suffice to point out that the issue of guaranty or warranty was wholly and fully found against DeAngelis by the trial Court (Findings VI, VII & VIII, T.R. 15-16), was not, and, in the absence of the Reporter's Transcript, could not be made an issue on this appeal. It would therefore follow that DeAngelis had no right to return the machine, as, indeed, the District Court impliedly found. Their only basis for returning the machine was pursuant to Sharples' offer.

But the issue stands on even firmer ground. When DeAngelis originally sought to return the machine, Sharples would have been wholly within its rights to stand on the contract of sale, demand payment in full, and, if DeAngelis then returned the machine, either to ship it back or hold it to the order of DeAngelis. There was no breach of warranty and no breach of any guaranty.

Sharples instead made an offer, which, as shown by *Cate v. Good Bros.,* supra, was one for compromise and settlement of the dispute, which, though baseless, could be vexatious. When DeAngelis thereafter shipped back the machine it indicated its agreement to compromise the matter on the terms of Sharples' offer. Not until some three and one half weeks after it shipped the machine back, and almost one and one

half months after Sharples' offer of compromise, did DeAngelis for the first time claim or assert any right to return the machine for any other reason or on any other ground than in accordance with Sharples' offer. At that stage their obligation to pay the cancellation charge had, as shown above, become binding.

III.

THIS COURT BASES ITS DECISION ON A MISCONCEPTION OF THE EVIDENCE—DeANGELIS DID NOT PRESS ITS CLAIM OF GUARANTEE "ALL ALONG".

Prior to the shipment of the machine on March 20, DeAngelis had given no indication that it relied on any right to return the machine for a claimed breach of guarantee.

On the contrary, DeAngelis' letter of February 22 recognized that there was no such right to return the machine, and no such right was asserted. DeAngelis requested "written permission" to return the machine, which is clearly inconsistent with a right so to return it.

The statement in the opinion that "all along, without any exception, DeAngelis had pressed its claim that the purchase was upon a guarantee and that performance had failed", is based on a misconception of the evidence.

In the correspondence there appear references to a PY-14 Super-D-Canter and to "super centrifuges". The machine involved in this litigation is the PY-14

Super-D-Canter. The "super centrifuge" referred to was an entirely distinct machine, performing an entirely distinct operation in the process set up by DeAngelis, not purchased from Sharples, and in no way the subject of this litigation or the responsibility of Sharples. Both machines were centrifugal machines, manufactured by Sharples, but the Super Centrifuge was a used machine bought by DeAngelis on the second-hand market. Each had its own function in the overall process alluded to in the correspondence.

The importance of bearing this in mind is readily apparent. The letter of January 16, 1952 (Plf's. Exh. 5, T.R. 34), the first indication of DeAngelis' dissatisfaction, states that "* * * it appears that centrifugation does not afford a better process when compared with filtration" (T.R. 35), and "we are convinced that the *super-centrifuges* will not give us the desired product." (T.R. 35). There is no claim that the PY-14 Super-D-Canter was not performing according to any guarantee, real or imagined.

DeAngelis' letter of February 22 (T.R. 36), asking permission to return the PY-14 Super-D-Canter, again refers to DeAngelis' dissatisfaction with the process of centrifugation without any charge that the Super-D-Canter had failed in respect to any guarantee.

DeAngelis' letter of March 14 (T.R. 40), the last letter before the Super-D-Canter was shipped, states only that "the performance of the PY-14 Super-D-

Canter was directly contingent on the performance of the Super Centrifuge * * *".

Finally, in DeAngelis letter of April 14, 1952 (T.R. 42), in which for the first time DeAngelis advises that it will not pay the service charge, not the slightest reference to any claim of guarantee or breach thereof appears.

The importance of this, in the light of the Court's opinion, cannot be over-emphasized.

At no time during the course of correspondence did DeAngelis put Sharples on notice that it claimed a breach of guarantee as to the PY-14 Super-D-Canter, which is the only machine with which we are concerned.

It therefore follows that DeAngelis' unqualified act of shipping the machine to Sharples can have reference only to Sharples' offer of March 5, and was an unambiguous and unequivocal act of acceptance of that offer, in line with the authorities cited in Section I, above.

IV.

IN THE ABSENCE OF THE REPORTER'S TRANSCRIPT FROM THE RECORD ON APPEAL THE FINDINGS OF THE TRIAL COURT AS TO ALL DISPUTED QUESTIONS OF FACT ARE PRESUMED CORRECT AND SUPPORTED BY COMPETENT EVIDENCE.

The appeal herein is supported by a record consisting almost entirely of the pertinent pleadings and other papers in the clerk's file and the correspondence between the parties, introduced as exhibits. The

appellant did not choose to designate the Reporter's Transcript of testimony taken during the two days of trial as part of the record on appeal. Inasmuch as the burden of affirmatively showing error is on the party complaining thereof (5 C.J.S. 562), and a presumption exists that, where the determination of a question presented for review depends on evidence and the record on appeal does not show or purport to show all the evidence pertaining to it, the evidence was sufficient to sustain the ruling of the trial Court (5 C.J.S. 273), the appellee chose to augment the record only by adding a small portion of the Reporter's Transcript showing Judge Lemmon's allowance of an amendment to the complaint, and by requesting that all of the exhibits be included.

We raise this point because it would appear that certain assumptions have been taken from the record which, as pointed out above, are not only not supported by but are negated by the evidence upon which Judge Lemmon based his judgment.

The rule which governs is aptly stated by Corpus Juris Secundum as follows:

> "Where none of the evidence is brought up on appeal and properly presented to the Appellate Court, the findings will be presumed to be sustained by the evidence, and a similar rule applies where but part of the evidence is brought up. If the evidence is not in the record it must be assumed that the facts as found were true, and that issues of fact were determined in favor of the prevailing party."
>
> 5 C.J.S. 412.

We raise this point, not because of any doubt that this Court has both the power and the right to determine whether the facts as found by Judge Lemmon and supported by the evidence sustain the legal conclusion that a contract was entered into for the payment of the cancellation charge, but because the language of the Court seems to indicate an acceptance by this Court as facts, of certain propositions—to-wit, that DeAngelis was pressing a claim of guaranty as to the PY-14 Super-D-Canter at the time it was shipped to Sharples (which is discussed in Part III above), the issue as to guarantee, and, in the concurring opinion, the question as to proof of an acceptance of Sharples' offer.

As to these matters, and any other question of fact, it is submitted that Judge Lemmon's findings are beyond attack by appellants in this Court in the absence of a complete record.

For the reasons stated above, petitioner requests that a rehearing be granted and that on such rehearing the judgment of this Court be reversed and the judgment of the United States District Court be affirmed.

Dated, San Francisco, California,
April 2, 1956.

Respectfully submitted,
WALTER K. OLDS,
EDWARD J. BOESSENECKER,
Attorneys for Appellee and Petitioner.

Certificate of Counsel

The Sharples Corporation, appellee herein, by its attorney, hereby certifies that the foregoing petition for rehearing is not presented for the purpose of delay or vexation, but is, in the opinion of counsel, well founded in law and proper to be filed herein.

Dated, San Francisco, California,
April 2, 1956.

Respectfully submitted,
Walter K. Olds,
Edward J. Boessenecker,
Attorneys for Appellee and Petitioner.